IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1849

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

GERALD L. SHARGEL,
Attorney in behalf of VINCENT ALOI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Attorney General of the State of New York petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, 1a-5a) is not yet reported. The opinion of the United States District Court for the Southern District of New York (App. C, *infra*, 8a-22a) is reported at 459 F.Supp. 700.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra*, 6a-7a) was entered on March 13, 1979. The jurisdiction of this Court is invoked under 29 U.S.C. 1254(1).

Questions Presented

1. In a state trial for committing perjury in testimony given to a grand jury under a grant of immunity, does the Fifth Amendment privilege against self-incrimination preclude the prosecution from introducing the record of the defendant's grand jury appearance in order to establish the perjury by showing the circumstances in which it was committed—circumstances which include a patently false and evasive assertion of an inability to recall?

2. In a habeas corpus proceeding in which it is claimed that it was a violation of the Fifth Amendment privilege against self-incrimination to introduce the entire record of the defendant's immunized grand jury testimony (with a few deletions) at his state trial for perjury committed before the grand jury, should the federal court re-determine whether such evidence had probative value or contextual significance, and give no weight to the ruling by the state trial judge who admitted the evidence?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall be compelled in any criminal case to be a witness against himself * * *.

N.Y. Criminal Procedure Law ("CPL"), Sec. 50.10(1), provides:

> A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

Section 190.40 of the New York Criminal Procedure Law provides, in pertinent part:

> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

(a) He has effectively waived such immunity pursuant to section 190.45; or

(b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

New York Penal Law Sec. 210.15 provides:

A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.

Statement of the Case

Following a jury trial in New York State Supreme Court, New York County, Vincent Aloi was convicted of Perjury in the First Degree (N.Y. Penal Law §210.15) for giving false testimony to a grand jury. On August 7, 1973, he was sentenced to an indeterminate term of two and one-third to seven years' imprisonment. Aloi is not serving his state sentence, but is in federal custody serving a nine-year sentence for an unrelated violation of federal securities laws. *United States* v. *Aloi, aff'd* 511 F.2d 585 (2d Cir.), *cert denied,* 423 U.S. 1015 (1975). A state detainer was lodged with federal authorities.

A habeas corpus petition was filed on Aloi's behalf in the United States District Court for the Southern District of New York claiming that Aloi's privilege against self-incrimination was violated when the record of his appearance before the grand jury, which was under a grant of immunity, was introduced at his perjury trial. The District Court granted habeas corpus relief and the United States Court of Appeals for the Second Circuit affirmed.*

Aloi's Grand Jury Appearance

A New York County grand jury was investigating the killing of Joseph Gallo in a downtown Manhattan restaurant on April 7, 1972. The grand jury heard evidence that a certain apartment "L-K", located at 101 Gedney Street in Nyack, New York, had been used by Aloi and others as a meeting place for planning Gallo's murder and for attempting to conceal the identity of the perpetrators after the murder was committed (French: T334-36).**

Pursuant to a subpoena, Aloi appeared before the grand jury for about one hour on November 28, 1972. Under New York law, a grand jury witness "automatically" receives immunity from prosecution for "any transaction, matter or thing concerning which he gave evidence." CPL Secs. 50.10(1), 190.40. This immunity does not extend, however, to a prosecution for perjury or contempt.

When Aloi was asked what his occupation was, he stated that he was a partner in a trucking business in which he worked and had invested. However, Aloi claimed that he

* In view of *Braden* v. *30th Judicial Circuit Ct. of Kentucky,* 410 U.S. 484 (1973), the State has not disputed that Aloi may seek federal habeas relief with respect to his future incarceration. Since this habeas proceeding concerns Aloi's future state custody, the Attorney General of the State of New York was named as a respondent and is the party who appealed the District Court's grant of the writ. See Rule 2(b) of the Rules Governing Sec. 2254 Cases in the United States District Courts. The District Attorney of New York County has represented the State throughout the federal and state post-conviction proceedings and continues to do so on this petition.

** "T——" refers to pages of the trial record, a copy of which was before the District Court and the Second Circuit.

could "recall" very little about his business. Asked when he went to work, Aloi questioned the meaning of "work" and "reporting" to work (T382-83, 387-88) and, despite persistent questioning, claimed that he could not recall when he had gone to work (T382-401, 409-11). Aloi stated that he had "no recollection" (T432) of even the approximate amount of the investment he said he had made in the business only six or seven years earlier (T419-421, 432-436) other than that it was "many thousands" (T432) and, when pressed, that it was "probably more than $30,000" (T434) and less than $90,000 (T435). Aloi also claimed little recollection concerning such matters as his income (T412) and what he did to earn it (T414-17), how long he had been involved in this trucking business (T380), and names of its employees (T401-403).

Asked whether he knew certain individuals (Carmine DiBiasi, Joseph Luparelli, Joseph Yacovelli) and when he had last seen them, Aloi responded that he was only casually acquainted with them and that he had not seen them in about a year (T418, 437-41, 444-47, 448-51).

Aloi was then asked whether he had ever been to the apartment in Nyack, New York, where the grand jury had learned that Joseph Gallo's murder was planned. The identity of the apartment was called to Aloi's attention not only by its address and designation ("L-K"), but also by asking whether Aloi had been in an apartment in Nyack with individuals (Yacovelli, Luparelli) whom, he had testified, he knew. In the course of responding to questions about whether he had been to the apartment, Aloi used the name "Joe Yac" (T458), which Aloi said was a

nickname for Joseph Yacovelli (T447). Despite the various ways in which the apartment in question was called to his attention, Aloi repeatedly denied ever visiting that apartment.

The State Prosecution

Aloi was indicted for Perjury in the First Degree for falsely swearing that he had never been to the Nyack apartment. Indictment No. 239/73. At the trial in June 1973, two agents of the Federal Bureau of Investigation testified that on April 18, 1972, which was eleven days after Gallo was murdered, they had watched Aloi enter the apartment in Nyack. Another witness, Joseph Luparelli, who had been involved in the killing of Gallo, described Aloi's visits to the apartment on several occasions before and after the murder.

When the minutes of Aloi's appearance before the grand jury were offered into evidence, defense counsel took the position that only the portion containing the statements charged in the indictment to be perjurious was admissible (T349, 351-52, 353-54, 355). The trial judge then excused the jury and discussed the matter with counsel. The judge stated that the minutes of Aloi's appearance would not be received "for the truth of the matters contained therein" (T350), and that Aloi's statements to the grand jury would not be treated as admissions (T350-51). The judge stated that he considered the minutes to be admissible "solely to show what transpired before the Grand Jury" (T350), so that "in the total context" (T351) the trial jury could determine whether perjury had been committed. The judge also stated that he considered the grand

jury minutes to have "some relevancy" (T356) on the issue of materiality.*

The trial judge then invited defense counsel to object to any particular statements made by Aloi before the grand jury which the defense considered prejudicial (T351, 352). However, defense counsel refused to request deletion of specific items in the grand jury minutes. The trial judge continued to urge defense counsel to object to any particular statements which he considered to be prejudicial. The judge himself suggested deletion of some material (T357, 359-60), and finally directed defense counsel to review the grand jury minutes and present any objections he had to specific statements (T358-60). Defense counsel still did not ask to have particular statements deleted (T360-61), except for one request which was granted (T363-64).

The judge then ruled that the record of Aloi's grand jury appearance, less the deleted material, would be admitted into evidence. The jury was instructed that grand jury testimony was not to be considered "for its truth" but solely to show what had transpired before the grand jury. The record of Aloi's grand jury appearance, apart from the statements concerning the Nyack apartment, could be considered only for its bearing on the issues of materiality and Aloi's state of mind in making the statements charged to be perjurious (T332, 362-63, 642-43, 652-53).

* Under New York law, the issue of materiality is an issue for the jury to determine. *See People* v. *Ianniello,* 36 N.Y.2d 137, 143-44 (1975). *See also Aloi* v. *Arnold,* 413 F.Supp. 1384, 1387 and n.12 (S.D.N.Y. 1976) (Weinfeld, J.), which dismissed on exhaustion grounds a habeas corpus petition filed by Aloi prior to the filing of the habeas petition which is the subject of the instant proceeding.

Aloi's conviction was affirmed by the Appellate Division, First Department, on June 11, 1974, without opinion (45 A.D. 2d 819). Leave to appeal to the Court of Appeals was denied on July 10, 1974, and, upon Aloi's motion for reargument, again denied on September 10, 1974.

The Federal Habeas Corpus Proceeding

In granting Aloi's habeas corpus petition, the District Court relied heavily on the decision by the Third Circuit in *United States* v. *Apfelbaum,* 584 F.2d 1264 (3d Cir. 1978), which this Court has recently decided to review (99 S.Ct. 1496; March 19, 1979, U.S. No. 78-972). Like the Third Circuit, the District Court regarded the general prohibition against use of immunized testimony "in any respect," *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972), as requiring that in a perjury trial the defendant's testimony given under a grant of immunity be excluded, except for the statements charged in the indictment to be perjurious and "the *minimal relevant* and *essential* other testimony necessary to be able to place the alleged perjury in its proper context." (Opinion of the District Court, App. C, *infra,* 17a; emphasis in original).

In the District Court's opinion, the introduction of the record of Aloi's appearance before the grand jury did not comply with this rule. The District Court considered Aloi's evasiveness in responding to questions about his business to be immaterial to developing the context in which the perjured testimony was given (*id.,* 17a, n. 14). The District Court considered Aloi's responses concerning his acquaintance with DiBiasi, Luparelli and Yacovelli, including whether Aloi knew their nicknames, to be "somewhat rele-

vant'' to developing the context of the perjury, but ''quite incriminating'' and erroneously admitted at the trial (*id.*, 17a, n. 14).

The District Court ruled that Aloi's grand jury testimony claiming lack of ''recall'' concerning his business was protected by the privilege against self-incrimination even though the State maintained that this testimony was on the face of the record, patently false and evasive. The State's contention was termed a ''bare allegation of falsity'' (*id.*, 20a) which was not sufficient to remove Aloi's grand jury testimony from the ambit of the privilege.

The District Court also rejected the State's contention that the introduction of the record of Aloi's grand jury appearance was, if error, harmless (*id.*, 21a). The District Court granted habeas corpus relief without reaching Aloi's second claim that he was denied due process by references to organized crime during the trial.

The Second Circuit affirmed the District Court's grant of the writ, stating that it found it unnecessary to decide whether to follow, as the District Court had, the Third Circuit's ruling in the *Apfelbaum* case or, as the State urged, the standard set forth in *Cameron* v. *United States*, 231 U.S. 710, 721 (1914). In *Cameron*, this Court stated that a witness' testimony given under a grant of immunity may be used ''for any legitimate purpose in establishing'' that he committed perjury in the same proceeding in which that testimony was given. The Second Circuit stated that ''even under the more liberal *Cameron* standard, it was clearly improper to admit virtually all of his [Aloi's] immunized

grand jury testimony. Since it was not shown that all of his testimony was false, the testimony could not have been admitted as unprotected by the grant of immunity. Assuming at least some of it was truthful, it had no probative value in determining whether the alleged perjurious portion was intentionally false.'' (Opinion of the Court of Appeals, App. A, *infra* 4a-5a).

Reasons for Granting the Petition

This case presents important issues concerning what the Fifth Amendment requires in the conduct of perjury trials when the perjury is charged to have been committed by a grand jury witness while testifying under a grant of immunity. An additional issue concerns the scope of federal habeas review of such perjury cases tried in the state courts. These issues are closely related to questions recently raised in two cases before this Court.

1. In *Dunn* v. *United States* (U.S. No. 77-6949, decided June 4, 1979), the Solicitor General urged this Court to decide whether a grand jury witness who testifies under a grant of immunity is protected from use of his testimony to prove that he subsequently committed the crime of false declarations. In support of his position that a witness is not constitutionally entitled to such protection, the Solicitor General maintained, first, that the question of whether a grant of immunity precludes use of the witness' testimony should be resolved by looking to whether, at the time the witness is called to testify, he may properly assert the privilege against self-incrimination.. Second, it was argued that a witness may not invoke the privilege on the ground that he fears that the testimony he is being compelled to

give may be used to prosecute him if he later commits perjury. *See United States* v. *Freed*, 401 U.S. 601, 607 (1971) (the privilege against self-incrimination does not supply "insulation for a career of crime about to be launched"); *see also* 401 U.S. at 610-612 (Brennan, J., concurring). Accordingly, the Solicitor General contended that Dunn's grand jury testimony, although given under a grant of immunity, could be used to show that in a later proceeding he gave an inconsistent statement under oath, thereby committing the crime of false declarations. Brief for the United States, pp. 36-57. This Court, in deciding the *Dunn* case, did not reach this issue. 47 U.S.L.W. 4607, 4609, 4611 n.14.

The issue briefed, argued but not reached in *Dunn* is presented by this case, although in slightly different form. Here, the question is whether a grant of immunity protects a witness from use of his testimony to prove that, after giving "immunized" testimony, he committed perjury later on in the same proceeding. Aloi's perjurious denial that he had ever been to the Nyack apartment was made subsequent to the testimony which Aloi claims was protected by the privilege against self-incrimination and the grant of immunity. If Aloi, before denying that he had been to the Nyack apartment, had invoked the privilege against self-incrimination on the ground that his testimony up to that point should not be used to prosecute him for perjury in the statements he was about to make, that claim would have been made with respect to an entirely prospective act.*

* That Aloi was granted immunity "automatically" under the New York statute (CPL 190.40) does not alter this analysis, which depends not upon the manner by which immunity is granted but upon whether, if no immunity had been granted, the privilege properly could have been asserted with respect to the perjury.

Thus, the issue in this case is whether a witness should be permitted to invoke the privilege against self-incrimination and remain silent on the ground that he is about to perjure himself. If the privilege may not properly be invoked on this ground, then the fact that Aloi's grand jury testimony was given under a grant of immunity would not render his testimony inadmissible at his perjury trial.

The Court of Appeals, however, viewed the grant of immunity as protecting Aloi from introduction of his grand jury testimony at his perjury trial (5a). The Court of Appeals thus implicitly rejected the contention made by the State below, based upon the position advanced by the Solicitor General in the *Dunn* case, that a witness does not receive immunity with respect to the use of his testimony to prove that he subsequently committed perjury. Even if, in the view of the Court of Appeals, Aloi's grand jury testimony as a whole "had no probative value in determining whether the alleged perjurious portion was intentionally false" (5a), the court should not have concluded that Aloi's Fifth Amendment privilege against self-incrimination was violated. A lack of probative value should have been regarded as simply an evidentiary error, not cognizable in a federal habeas corpus proceeding except as part of Aloi's claim that his trial was so unfair as to constitute a denial of due process—a claim which was made but not passed upon by the courts below.

2. In *United States* v. *Apfelbaum*, 584 F.2d 1264 (3d Cir. 1978), upon which the District Court relied in granting Aloi's habeas petition, this Court has granted the Solicitor General's petition for review (99 S.Ct. 1496; March 19, 1979, U.S. No. 78-972). The *Apfelbaum* case concerns the

scope of permissible use of "immunized" testimony to prove that a witness committed perjury in the same proceeding in which his testimony was given.

The instant case, while decided by the Court of Appeals without reliance on the standard employed by the Third Circuit in *Apfelbaum,* presents important issues which are closely related to the issues before this Court in the *Apfelbaum* case. If this Court decides in that case to adhere to the standard set forth in *Cameron* v. *United States, supra*—which permits the defendant's testimony, though "immunized," to be introduced "for any legitimate purpose" to establish the perjury, 271 U.S. at 721—then the holding of the Court of Appeals presents a significant question. That question, assuming, as held by the Court below, that Aloi's grand jury testimony had no probative value in establishing the perjury, is whether a trial judge's erroneous ruling that the proffered testimony is probative of the perjury constitutes a violation of the privilege against self-incrimination. Or, is such an error simply an incorrect evidentiary ruling which is not cognizable in a federal habeas corpus proceeding except as part of a claim that the trial was fundamentally unfair and deprived the defendant of due process?

The ruling of the Court of Appeals also raises the issue of whether the federal courts, in habeas corpus review of state perjury convictions, should determine the probative value or contextual significance of the defendant's grand jury testimony without giving great weight to the ruling made by the state trial judge in receiving that evidence. The trial judge exercised his discretion to admit the entire record of the defendant's brief grand jury appearance

(after deleting particular portions objected to as prejudicial) for the limited purpose of showing what transpired during that appearance. Significantly, much of that testimony is defendant's patently false and evasive assertions of an inability to recall. These false assertions tended to show that defendant acted intentionally in committing the alleged perjury and were not protected by the Fifth Amendment. *See United States* v. *Kahan,* 415 U.S. 239, 243 (1974) ("the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity").

Conclusion

The petition for a writ of certiorari should be granted or, in the alternative, held pending the determination of* United States *v.* Apfelbaum *(U.S. No. 78-972).

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

ROBERT M. PITLER
HENRY J. STEINGLASS
Assistant District Attorneys
Of Counsel

June, 1979

Appendices

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 656—August Term, 1978.

(Argued February 6, 1979 Decided March 13, 1979.)

Docket No. 78-2143

GERALD L. SHARGEL, Attorney in Behalf of Vincent Aloi,
Petitioner-Appellee,

against

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Respondent-Appellant,

and

CHARLES E. FENTON, Warden of the Federal Penitentiary at Lewisburg, as Agent for the State of New York,
Respondent.

Before:

WATERMAN, MANSFIELD and TIMBERS,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge,* granting a petition for a writ of habeas

corpus filed on behalf of a state prisoner convicted of Perjury in the First Degree, N.Y. Penal Law §210.15, for giving false testimony before a grand jury. The writ was granted on the ground that the state court improperly admitted into evidence at the perjury trial the entire transcript (with a few deletions) of the petitioner's immunized grand jury testimony.

Affirmed.

HENERY J. STEINGLASS, Assistant District Attorney, New York, NY (Robert M. Morgenthau, District Attorney, New York County, Robert M. Pitler, Assistant District Attorney, New York, NY, of counsel), *for Appellant.*

GERALD L. SHARGEL, Esq., New York, NY (Fischetti & Shargel, New York, NY, of counsel), *for Appellee.*

PER CURIAM:

The State of New York appeals from a judgment of the United States District Court for the Southern District of New York, Gerald L. Goettel, *Judge,* entered on October 13, 1978, granting the petition of Gerald L. Shargel for a writ of habeas corpus on behalf of Vincent Aloi, who was convicted by the New York Supreme Court of perjury in the first degree, N.Y. Penal Law §210.15, after a jury trial for giving false material testimony before a grand

jury. Under New York Criminal Procedure Law §§50.10(1) and 190.40 Aloi automatically received transactional immunity which did not extend to perjurious testimony.[1] At the jury trial of Aloi for perjury the state trial judge, although the defendant's alleged false testimony wherein he denied ever being at a certain apartment in Nyack, New York, constituted but a small portion of the 92-page transcript of his entire grand jury testimony, admitted into evidence over Aloi's objection the entire transcript (except for a few minor deletions) on the ground that it could be used by the jury to determine the materiality of

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1. Section 50.10(1) of the New York Criminal Procedure Law provides in pertinent part:

> "A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses 'immunity' from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein."

Section 190.40 provides in pertinent part:

> "1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> "2. A witness who gives evidence in a grand jury proceeding receives immunity unless:".

Although a grant of immunity to a witness must be co-extensive with his Fifth Amendment privilege against self-incrimination, *Kastigar* v. *United States,* 406 U.S. 441, 448-49 (1972), this does not preclude prosecution of the witness for giving perjurious testimony under the grant, *United States* v. *Tramunti,* 500 F.2d 1334, 1342 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974). Otherwise the purpose of the immunity grant, which is to obtain the witness' truthful testimony, would be defeated.

the alleged false statements and whether the defendant knew they were false. The district court, relying heavily upon the Third Circuit's decision in *United States* v. *Apfelbaum,* 584 F.2d 1264 (3d Cir. 1978), granted the writ on the ground that the state was precluded by the grant of immunity from introducing any of Aloi's immunized testimony except "the perjurious statements alleged in the indictment plus the minimal relevant and essential other testimony necessary to be able to place the alleged perjury in its proper context."

In *Cameron* v. *United States,* 231 U.S. 710, 720-24 (1914), the Supreme Court, in holding that truthful immunized testimony by the defendant in one proceeding was protected by a statutory grant of immunity from use to prove perjury in another proceeding,[2] indicated that the testimony might be used "for any legitimate purpose in establishing" the perjury in the same proceeding, 231 U.S. at 721. The state contends that this language authorizes a more liberal standard than that applied in *Apfelbaum, supra,* which made no reference to *Cameron.*

We find it unnecessary to decide in this case whether the *Apfelbaum* or some more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, even under the more liberal *Cameron* standard, it was clearly improper to admit virtually all of his immunized grand

2. See, in accord, *United States* v. *Housand,* 550 F.2d 818, 823 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977); *United States* v. *Berardelli,* 565 F.2d 24, 28 (2d Cir. 1977).

jury testimony. Since it was not shown that all of his testimony was false, the testimony could not have been admitted as unprotected by the grant of immunity. Assuming at least some of it was truthful, it had no probative value in determining whether the alleged perjurious portion was intentionally false.

Accordingly the judgment of the district court is affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of March, one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN
HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges,

78-2143

GERALD L. SHARGEL, attorney in behalf of Vincent Aloi,
Petitioner-Appellee,

v.

CHARLES E. FENTON, *et al.*,
Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By: /s/ ARTHUR HELLER

ARTHUR HELLER,
Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 1218 (GLG)

GERALD L. SHARGEL,
Attorney in behalf of Vincent Aloi,
Petitioner,

against

CHARLES E. FENTON,
Warden of the Federal Penitentiary at Lewisburg, as Agent for the State of New York and
LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Respondents.

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Of Counsel

Opinion of the District Court

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By: Robert M. Pitler, Esq.
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Assistant District Attorneys
Of Counsel

GOETTEL, D.J.:

In this habeas corpus action under 28 U.S.C. §2241, petitioner Aloi[1] seeks to vacate his New York State perjury conviction and the accompanying detainer now lodged against him. Petitioner alleges that his conviction violated both his Fifth Amendment right against self incrimination and his right to due process of law under the Fourteenth Amendment to the United States Constitution.

Aloi appeared under subpoena on November 28, 1972 before a New York County Grand Jury investigating the killing of Joseph Gallo. Upon his refusal to sign a waiver of immunity petitioner automatically received transactional

1. This petition for habeas corpus has been brought by Gerald L. Shargel as attorney for Vincent Aloi. Hereafter, all use of the term "petitioner" shall refer exclusively to Vincent Aloi.

immunity pursuant to New York Criminal Procedure Law §190.40 (McKinney, 1971). Following this grant of immunity, petitioner testified that he had never visited a certain apartment in Nyack, New York, allegedly the meeting place for the planning of Gallo's murder and the subsequent attempts to conceal the identity of the perpetrators. As a result of this denial, petitioner was indicted for perjury in the first degree.[2]

At the perjury trial in June, 1973, a number of witnesses testified as to Aloi's presence in the Nyack apartment. In addition, the prosecution, over the objection of defense counsel, introduced into evidence almost all of Aloi's immunized grand jury testimony. Much of this material contained statements far beyond the *corpus delicti* of the perjury, including many questions relating to the nature of petitioner's employment that attempted to characterize the petitioner as an organized crime figure.[3] The trial court allowed this material into evidence for the purpose of determining the materiality of the allegedly perjurious statement to the grand jury's investigation. Petitioner contends that the introduction of these minutes constituted both an impermissible use of compelled testimony in derogation of his Fifth Amendment right against self incrimination, and so prejudiced the jury as to make impossible a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment.

Petitioner was convicted in New York State Supreme Court and sentenced to two and one-third to seven years

2. N.Y. Penal Law §210.15 (McKinney 1971).

3. *See* note 12 and accompanying text, *infra* for a full description of the material involved.

imprisonment. The Appellate Division affirmed without opinion, 45 App. Div. 2d 819, and the Court of Appeals denied leave to appeal. Thereafter, Aloi petitioned in federal court for a writ of habeas corpus claiming both self incrimination and due process grounds. Judge Weinfeld found, *United States ex rel. Aloi* v. *Arnold,* 413 F. Supp. 1384 (S.D.N.Y. 1976), that the due process ground had not been raised on appeal in state court and thus that there had been no exhaustion of state remedies with regard to that claim. Since he found that the due process claim was sufficiently related to the self incrimination claim so as to preclude review of either until the due process claim had been properly presented to the state court, he denied the petition without prejudice.

Petitioner returned to the state courts to move under New York's post-conviction statute[4] to vacate the judgment on both self incrimination and due process grounds. He failed, however, to offer any explanation why the due process claim had not been raised on direct appeal, a failure which precluded the state Supreme Court from reviewing the claim on the merits.[5] The motion was denied, as was leave to appeal to the Appellate Division. Petitioner thereupon brought his second federal habeas corpus petition on the same two grounds. Judge Stewart, in *Shargel ex rel. Aloi* v. *Arnold,* No. 77 Civ. 316 (S.D.N.Y. May 27, 1977) (unreported opinion), once again found that there had been

4. N.Y. Crim. Proc. Law §440.10 (McKinney 1971).

5. N.Y. Crim. Proc. Law §440.10(2)(c). Under the terms of this provision, a petitioner must demonstrate that his failure to raise an issue on direct appeal was "justifiable" in order to permit the Court to make a post-conviction determination on the merits.

no exhaustion of state remedies because the state court had not had the opportunity to determine whether petitioner's failure to raise the due process claim on direct appeal was "justifiable," (and thus whether the motion could have been heard on the merits), and denied the petition. Whereupon petitioner once again went back to state court to file a second post-conviction motion to vacate, this time accompanied by an affidavit explaining his earlier actions.[6] This motion was denied, as was leave to appeal to the Appellate Division.

Petitioner has now filed his third federal habeas corpus petition alleging the same two claims. No motion has been made by the respondents to dismiss for failure to exhaust state remedies. We agree that petitioner has finally exhausted his state remedies, and met the requirement set out in *Picard* v. *Connor*, 404 U.S. 270, 276 (1971) to present "the state courts with the same claim he urges upon the federal courts." *See United States ex rel. Gibbs* v. *Zelker*, 496 F.2d 991, 994 (2d Cir. 1974); *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121, 1124 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972). Thus, this Court may now, on petitioner's third try, reach the merits of the petition.[7]

6. Petitioner's explanation consisted of an affidavit submitted by the attorney who had represented him on his direct appeal. In that affidavit the attorney stated that he believed that he had raised the due process issue on appeal but had inartfully failed to make specific reference to the appropriate constitutional provisions.

7. At the present time the petitioner is in federal custody serving a nine-year term on an unrelated federal conviction. Respondents, however, in light of *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), do not contest petitioner's right to challenge his future state incarceration.

The Self Incrimination Claim

An important function of the Fifth Amendment is to guarantee an individual's right against self incrimination by protecting him from being compelled to be "a witness against himself" in a criminal case.[8] The function of the grand jury is to investigate fully all potential criminal charges to insure that, "serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion of Burger, C.J.). On occasion, the need of a grand jury to know comes into conflict with a witness' right against self incrimination. In such a situation, as was noted by the Second Circuit in *United States* v. *Tramunti*, 500 F.2d 1334, 1342 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974), "[t]he accommodation between the right of the government to compel testimony on the one hand and the constitutional privilege to remain silent on the other, is the immunity statute."

In order for a grand jury to compel testimony over a claim of privilege, it is necessary that the immunity afforded be at least as insulating as the protection afforded

8. The Fifth Amendment's guarantee against self incrimination protects an individual from state as well as federal encroachment. The Supreme Court held in *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964): "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twinings* [*Twinings* v. *New Jersey*, 211 U.S. 78] for such silence."

under the Constitution. In *Kastigar* v. *United States,* 406 U.S. 441, 453 (1971), the Supreme Court held that the federal immunity statute, 18 U.S.C. §§6002-3, which provides for use and derivative use immunity is, "coextensive with the scope of the privilege itself against self incrimination." *See Glickstein* v. *United States,* 222 U.S. 139 (1911). New York's immunity statute, which provides for transactional immunity as well as that for use and derivative use,[9] is even more protective. As immunity is treated as having "substituted for the privilege," *United States* v. *Mandujano,* 425 U.S. at 576, a "witness can be compelled to answer, on pain of contempt, even though the testimony would implicate the witness in criminal activity." *Id.* at 575.

Since the transactional immunity afforded a grand jury witness under New York law provides greater protection than does the Fifth Amendment itself, it is clear that the compelled testimony of such an immunized witness cannot be used by, "prosecutorial authorities . . . in any respect . . . [and] cannot lead to the infliction of criminal penalties on the witness." *Kastigar* v. *United States,* 406 U.S. at 453.[10] The only exception to this rule occurs when the witness perjures himself. As noted recently by the Third Circuit in *United States* v. *Apfelbaum,* No. 77-2427, slip op. at 10 (3d Cir. Aug. 10, 1978): "Perjury however is a violation of an independent criminal statute, and as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated." Thus a witness, despite the grant of immunity, and without coming into conflict with the constitutional prohibition against compulsory self incrimination, *United States* v. *Mandujano,* 425 U.S. at 576-577,[11] can be prosecuted for his perjurious statements before the grand jury.[12]

To prove perjury against a defendant the prosecution can introduce into evidence such part of the defendant's immunized testimony as is necessary to establish the *corpus delicti* of the offense. *United States* v. *Apfelbaum,* No. 77-2427, slip op. at 11; *United States* v. *Hockenberry,* 474 F.2d 247, 249 (3d Cir. 1973). Use in this manner of such limited portion of the immunized testimony is the extent to which the prosecution can go without violating the Fifth Amendment. In defining *corpus delicti* the court in *Apfelbaum* stated, *supra,* at 11, n.9: "[W]e define *corpus delicti* to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place

9. The immunity afforded a witness in a grand jury proceeding under N.Y. Crim. Proc. Law §190.40 is defined in §50.10(1) (McKinney 1971) which states, in pertinent part that: "A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses 'immunity' from any such conviction, penalty or forfeiture."

10. *Kastigar* dealt with the less inclusive federal immunity statute. Whatever protections are afforded by that statute are encompassed in New York's transactional immunity law.

11. The Supreme Court has held that prosecution for false statements or perjury can be had even in cases where the government exceeded their authority in making the inquiry. *See, e.g., United States* v. *Wong,* 431 U.S. 174 (1977); *United States* v. *Knox,* 396 U.S. 77 (1969). *Bryson* v. *United States,* 396 U.S. 64 (1969).

12. N.Y. Crim. Proc. Law §50.10(1) (McKinney 1971) provides, in pertinent part: "A person who possesses such immunity [transactional] may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceedings."

the charged falsehood into its proper context." *See United States* v. *Berardelli,* 565 F.2d 24 (2d Cir. 1977); *United States* v. *Housand,* 550 F.2d 818 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977); *United States* v. *Tramunti,* 500 F.2d 1334.[13] Beyond this minimal use, as noted in *Housand, supra* at 822, truthful grand jury testimony is "not admissible to prove perjury for its use . . . [i]s proscribed by the immunity granted."

The respondent asserts that petitioner's grand jury testimony is admissible for any "legitimate purpose" to show that petitioner perjured himself before the grand jury. We cannot accept such a broad formulation. The court in *Hockenberry,* 474 F.2d at 250, stated that, "if immunity that deprived him [the defendant] of that privilege [against self incrimination] is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing." The extent to which immunized testimony can be introduced by the prosecution in a later proceeding is thus severely circumscribed. *United States* v. *Apfelbaum,* No. 77-2427, slip op. at 12. In *Apfelbaum,* the Court held that only that part of the immunized testimony which was "in-

13. The Second Circuit in *Tramunti* cited and endorsed the Third Circuit's decision in *Hockenberry,* reading that case as standing for the proposition that you cannot use truthful immunized grand jury testimony in a later prosecution. *Tramunti* held, however, that the immunity statute did not prevent the use of *false* grand jury testimony for impeachment purposes at a criminal trial. The Third Circuit has subsequently seen *Tramunti* as "embracing the principle that while truthful testimony can have no subsequent use under a grant of immunity, *untruthful* testimony is unprotected. That same principle was announced in *Hockenberry,* and is endorsed here." *United States* v. *Frumento,* 552 F.2d 534, 543 n.16 (3d Cir. 1977).

corporated in *haec verba* in the perjury indictment" could be considered part of the *corpus delicti, id.* at 11 n.9, and therefore admissible. In this case, however, we see no need to limit the *corpus delicti* to the same extent. We define *corpus delicti* as being the perjurious statements alleged in the indictment plus the *minimal relevant* and *essential* other testimony necessary to be able to place the alleged perjury in its proper context. Material beyond this may not be introduced at trial, nor may it be contained in the indictment.

In the state's prosecution against Aloi virtually the entire minutes of his immunized grand jury testimony was introduced into evidence. This material went far beyond that minimal amount of other testimony which was needed to place the alleged perjury in its proper context, and thus was not within the *corpus delicti.*[14] It has been held that that part of the immunized testimony which is not within the *corpus delicti* of the perjury cannot be used by the pros-

14. The minutes of petitioner's testimony before the grand jury constitute 90 pages of the trial record. Of that material, 59 pages, or nearly two-thirds of the minutes, relate to matters which appear altogether immaterial both to the alleged perjurious statement and to developing the context in which the perjured testimony was given. Questions and answers concerning the nature of Aloi's business, how the business was run, where it was located, the dates during which Aloi worked, and the extent of income derived from it, formed the substance of this material (Trial Transcript pages 378-437). An additional 18 pages of testimony concern matters only somewhat relevant to developing the context of the perjury, which at the same time are, however, quite incriminating in regards to petitioner's organized crime connections. Question and answers here concerned the nature of petitioner's relationship with such individuals as Messrs. DiBiasi, Luperelli and Yacavelli, and included such questions as (Transcript at 447), "Do you know his nickname?" (Transcript at 437-455). Only 9 pages of the minutes contain questioning which is directly relevant to the issue of petitioner's presence in the Nyack apartment (Transcript at 456-464).

ecution as substantive evidence in proving its case in chief. *United States* v. *Apfelbaum,* No. 77-2427, slip op. at 12. Nor can such testimony be used for the purpose of impeachment if the grand jury witness is later called to testify at trial. *United States* v. *Frumento,* 552 F.2d 534, at 542-543 (3d Cir. 1977); *United States* v. *Tramunti,* 500 F.2d at 1344; *United States* v. *Hockenberry,* 474 F.2d at 250. As was stated in *Frumento, supra,* at 543, and quoted with approval in *Apfelbaum, supra,* at 12:

> "Clearly, if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony we would then be affording the immunized witness something less than his full Fifth Amendment protection."

We now hold that that part of Aloi's immunized testimony not within the *corpus delicti,* material which in fact goes very far beyond that which is necessary, or even relevant, to placing the alleged perjury in its proper context, cannot be allowed into evidence against the petitioner either for the prosecution's stated purpose of determining the materiality of the alleged perjury (which could have been determined by using testimony within the *corpus delicti* and by other evidence) or for the purpose of showing that he committed perjury while testifying. Use in such a manner constitutes an impermissible infringement upon his privilege against self incrimination: "Nor may such use be harmonized with the scope of immunity afforded . . . [the defendant] by statute, because as the Supreme Court has declared, use and fruits immunity is, and must necessarily

be, co-extensive with the privilege." *United States* v. *Apfelbaum,* supra, at 12. Since such material was introduced against the petitioner, we find that his conviction in state court was obtained in derogation of his Fifth Amendment rights. In such situations federal habeas corpus relief is appropriate.

The respondent contends, nevertheless, that the grand jury testimony is admissible because it was false and evasive and thus not within the protection of the Fifth Amendment. That such false testimony is not protected is clear: "If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth the Constitution was intended to protect." *United States* v. *Tramunti,* 500 F.2d at 1342. *Accord, United States* v. *Moss,* 562 F.2d 155 (2d Cir.), *cert. denied,* 46 U.S.L.W. 3535 (U.S. Mar. 6, 1978); *United States* v. *Housand,* 550 F.2d 818. But before this rule can come into effect, there must be more than just a mere allegation that such testimony is false. In deciding this same question the Third Circuit in *Apfelbaum,* No. 77-2427, slip op. at 13 stated: "Permitting the government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement." The Court there held that such immunized statements could not be used until they were incorporated "into a false swearing indictment as the *corpus delicti* of the indictment." The Second Circuit has not gone this far and does not require that the false testimony be part of the *corpus delicti* of an indictment to be

usable. However, there must be some independent proof of the falsity before the testimony is admissible. *See, e.g., United States* v. *Moss,* 562 F.2d at 165. ("[T]he acknowledgement by the defendant that it was perjurious rendered it usable."); *United States* v. *Berardelli,* 565 F.2d at 29 ("Nothing in the *Tramunti* decision suggests that the result in that case would be the same if it could not have been independently determined that the immunized testimony is false."); *United States* v. *Housand,* 550 F.2d at 823 n.8. Respondent's bare allegation of falsity is insufficient to remove petitioner's grand jury testimony from the ambit of Fifth Amendment protection.

Similarly, we cannot accept the respondent's contention that even if the admission of the testimony was error, it was harmless error since there was overwhelming other evidence to convict him with. The jury in the petitioner's trial, which after five hours of deliberation reported a deadlock, reached a verdict only after additional instruction was given and testimony re-read. The difficulty of the jury in reaching a verdict seems to refute the respondent's claim that the evidence was "overwhelming." In addition, even if it appears to us that sufficient other evidence existed for the jury to convict the petitioner, this does not mean that the error was harmless. The Supreme Court in *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946) held: "[T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." The Court concluded that only if it is sure "that the error did not influence the

jury, or but had a very slight effect," *id.,* may the verdict stand. *See United States* v. *Check,* No. 77-1208, slip op. at 6755-56 (2d Cir. July 17, 1978). Given the difficulty of the jury in reaching a verdict, and the damaging nature of the grand jury testimony (with its allegations of organized crime connections) it seems unlikely that the jury was not influenced, or only slightly influenced, by the testimony. We find that the error in admitting Aloi's grand jury testimony was far from harmless.

We hold that the introduction into evidence, even for a restricted purpose, of substantially all of the petitioner's immunized grand jury testimony violated the petitioner's Fifth Amendment rights.

The Due Process Claim

Petitioner presents a second ground upon which to attack his state conviction, contending that he was deprived his right to due process of law guaranteed under the Fourteenth Amendment by the prosecution's "egregious misconduct" at his trial. These allegations raise serious constitutional questions about the fairness of the trial. *See Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1973). A serious question is also raised as to whether, in light of the Supreme Court's recent decision in *Wainright* v. *Sykes,* 433 U.S. 72 (1977), this Court has jurisdiction to reach the merits of this claim, or whether we must find that under state law petitioner has waived his right to raise the due process issue. In view of this Court's disposition of petitioner's self incrimination claim, however, there is no need to reach these issues.

Opinion of the District Court

The writ of habeas corpus is granted and the detainer against petitioner is hereby vacated, unless the state commences a new trial of petitioner within 90 days.

So Ordered:

s/ Gerard L. Goettel

U.S.D.J.

Dated: New York, N.Y.,
October 13, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1849

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

—against—

GERALD L. SHARGEL,
Attorney in Behalf of VINCENT ALOI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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The respondent Gerald L. Shargel, attorney in behalf of Vincent Aloi, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 596 F.2d 42.

Question Presented

Where a criminal defendant is tried on an allegation that he testified falsely under a grant of immunity, is it constitutionally permissible to introduce truthful immunized testimony that is completely unrelated to the corpus delicti of the perjury charge?

Statement of Facts

Petitioner's statement of the facts (pp. 4-11) fails, with due respect, to supply this court with a clear description of what occurred during Aloi's appearance before the New York County Grand Jury on November 28, 1972. In order to sharpen the focus on these facts, facts which are critical to the issue raised, Respondent submits the following.

The issue framed in this petition was born from the introduction at trial of People's Exhibit 10, which consisted of 86 transcript pages—virtually the entire appearance—of Aloi's immunized testimony before the Grand Jury. (A 37-38)* The defense position at trial, as it was in the New York Appellate Courts and in the Federal habeas proceeding, was that since the testimony was immunized, the only admissible portion was that which related to the corpus delicti of the alleged perjury. (A 38-39) Except for a particular deletion regarding other subpoenas to which he was then subject, the entire testimony was read to the petit jury limited only by the Court's instruction that the majority of it was relevant solely to the issue of materiality. (A 50-53) As analyzed in the District Court opinion by Judge Goettel:

> "The minutes of petitioner's testimony before the grand jury constitute 90 pages of the trial record. Of that material, 59 pages, or nearly two-thirds of the minutes, relate to matters which appear altogether immaterial both to the alleged perjurious statement and to the developing the context in which the perjured testimony was given. Questions and answers concerning the nature of Aloi's business, how the business was run,

* The letter "A" refers to Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

> where it was located, the dates during which Aloi worked, and the extent of income derived from it, formed the substance of this material (trial transcript pp 378-437). An additional 18 pages of testimony concerned matters only somewhat relevant to developing the context of the perjury, which at the same time are, however, quite incriminating in regards to Petitioner's organized crime connections. Question[s] and answers here concerned the nature of Petitioner's relationship with such individuals as Messrs. DiBiasi, Luperelli and Yacavelli [sic] and included such questions as (transcript at 447) 'Do you know his nickname?' (Transcript at 437-455). Only nine pages of the minutes contained questioning which is directly relevant to the issue of Petitioner's presence in the Nyack apartment. (Transcript at 456-464)."

Although the Petitioner describes Aloi's appearance before the grand jury as "brief", further analysis reveals the following: while testifying under a grant of immunity, Aloi was asked and answered more than 500 questions before the grand jury.* Although the alleged act of perjury related to Petitioner's singular assertion that he had never been to apartment LK at 101 Gedney Street, Nyack, New York, this topic, viewed liberally, was covered in some 57 questions and answers before the grand jury. The prosecutor's tireless framing and reframing of substantially the same question was met with Petitioner's equally tireless denials with substantially the same answer. (A 124, 133-39, 141 et seq.) If the petit jury were to believe

* The numbers set forth are not intended to be precise. Precision has been made difficult, if not unobtainable, by the repetitious manner in which the questions were posed. Nevertheless, these comparisons are useful in gauging the content and probative relevance of Petitioner's testimony before the grand jury.

the People's witnesses, these 57 questions clearly established the corpus delicti of the crime and would, therefore, have completed the People's prima facie case. These questions, of course, did not bear on the issue of materiality but, rather, went to the issue of Petitioner's alleged false testimony.

On the question of materiality, pursuant to instructions of the trial court, the jury was allowed to consider some 502 additional questions and answers. The relevance of this other testimony to the question of materiality or "context" ranged from somewhat relevant to completely irrelevant. Interestingly, of these 502 other questions and answers, 335 related to Aloi's employment and business interests which had no conceivable relevance to the inquiry of the grand jury before which he appeared. The remaining questions and answers before the grand jury related either to the general topic of the Gallo murder or Aloi's acquaintance with alleged co-conspirators DiBiasi, Yacavelli and Phillip Gambino. (A 60-67, 107, 116-124, 133, 138-141) Aloi's contention in the courts below was that the introduction of the more than 300 questions and answers relating to other than the corpus delicti of the perjury was constitutional error.

Reasons Why the Writ Should Be Denied

Petitioner maintains that "this case presents important issues concerning what the Fifth Amendment requires in the conduct of perjury trials when the perjury is charged to have been committed by a grand jury witness while testifying under a grant of immunity." Respondent respectfully contends that no such "important issues" are raised by this petition since the constitutional principles on which the Circuit Court affirmed the District Court's issuance of the writ have been clearly established since

this court decided, some 65 years ago, *Cameron* v. *United States,* 231 U.S. 710 (1914).

The State's argument in the Circuit Court of Appeals was that the District Court "ignored" the *Cameron* decision and erroneously relied on the Third Circuit's decisions in *United States* v. *Hockenberry,* 474 F.2d 247 (3d Cir. 1973) and *United States* v. *Apfelbaum,* 584 F.2d 1264 (3d Cir. 1978) *cert. granted* 99 S.Ct. 1496 (1979). The Circuit Court, however, without deciding whether to adopt the *Apfelbaum* rule found that under *Cameron,* the very case on which Petitioner relied, admission of Aloi's entire appearance before the grand jury was constitutionally improper.

> "We find it unnecessary to decide in this case whether the *Afpelbaum* or some more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, *even under the more liberal Cameron standard,* it was clearly improper to admit virtually all of his immunized grand jury testimony. Since it was not shown that all of his testimony was false, the testimony could not have been admitted as unprotected by the grant of immunity. Assuming at least some of it was truthful, it had no probative value in determining whether the alleged perjurious portion was intentionally false." 596 F.2d at p. 44

Thus, the fact that this court will, in its next term, review the *Afpelbaum* case does not support a finding that this case is appropriate for review as well. In short, *Afpelbaum* arguably went beyond *Cameron.* This case did not.

In *Cameron* this court held that immunized testimony could be used for any "legitimate purpose" in establishing

the perjury charge. But the "use" of this testimony, beyond establishing the perjury was improper.

> "The subsequent prosecution of *Cameron* for perjury in the two bankruptcy proceedings was a criminal proceeding in a court of the United States, and testimony given in the one bankruptcy proceeding, *not tending to establish perjury in that proceeding,* should not have been received to establish perjury charged in the other proceeding." 34 S.Ct. at 248 (emphasis supplied).

In this case Aloi's testimony on the subject of his employment and business interests had no "legitimate purpose" relative to establishing the perjury charge concerning the Nyack visit.

In *Afpelbaum* truthful immunized testimony, *relevant* to the prosecution's case, was held inadmissible since it went beyond the corpus delicti of the perjury charge. The *Afpelbaum* rule therefore is far more stringent than the "rule" interpreted from the broader language found in *Cameron.* The point to be made here is that the instant case does not contain an *"Afpelbaum"* issue.

Nor does this case, as Petitioner suggests, present any issue whatsoever concerning the scope of federal habeas corpus review of evidentiary rulings in state perjury prosecutions. (Petition p. 14) The Court of Appeals decision in this case does not represent federal review of a state court evidentiary ruling. Rather, it is a constitutional ruling which is involved. Where as here, the questioned evidence is patently irrelevant to the perjury charge it is constitutional, not evidentiary error which flows from the admission of the testimony.

Finally, only brief mention need be made of the state's effort to rely on the "solicitor general's position" in *Dunn*

v. *United States,* —— U.S. —— (June 4, 1979) in order to obtain a writ of certiorari in this case. Undaunted by the fact that *Dunn* is not on point, petitioner nevertheless urges an "approach" which makes no sense in the context of this case and the theory of which has been rejected by this court in *Cameron.* Petitioner argues that a witness has no Fifth Amendment privilege and no right to remain silent on the ground that he is about to perjure himself. Thus, Petitioner argues, the witness' immunized testimony may be used to prove that he committed perjury in the same proceeding in which that testimony was given. It is of course concededly true that if Petitioner did not have a legitimate Fifth Amendment claim, the immunity supplied would not afford protection that the Fifth Amendment itself would not supply. There was however in this case no suggestion, nor could there be, that Aloi did not have a legitimate Fifth Amendment claim. If Petitioner's "approach" were accepted under the facts of this case, Aloi would not be left in the same position as if he had succeeded in remaining silent by virtue of his Fifth Amendment privilege. Thus, no longer would the witness and the Government be left "in substantially the same position as if the witness had claimed his privilege." *Kastigar* v. *United States,* 406 U.S. 441, 458-59 (1972). Despite Petitioner's assertion (page 13) there is no issue in this case about "whether a witness should be permitted to invoke the privilege against self-incrimination and remain silent on the ground that he is about to perjure himself."

With a view toward this court's decision in *Cameron* v. *United States,* this case involves nothing other than a clear cut violation of respondent's Fifth Amendment rights by the introduction of truthful immunized testimony which had no conceivable relevance to the perjury charge on which respondent was convicted. The careful opinion of the

District Court and the *per curiam* affirmance by the Court of Appeals demonstrate conclusively that there is no uncertainty about the issues raised by this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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On March 3, 1980, this Court held in *United States* v. *Apfelbaum,* 78-972 that the Fifth Amendment did not preclude the use of a witness' immunized testimony at a subsequent prosecution for perjury, "so long as that testimony conforms to otherwise applicable rules of evidence." (Majority Slip Op. p. 16). Petitioner in the instant case has claimed that the issues contained in *Apfelbaum* and this case are identical.* Although the District Court, in granting federal habeas relief, relied in part upon the Third Circuit's decision in *Apfelbaum,* the Court of Appeals in

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* See State's Petition for Certiorari at pages 11-15 and letter to the Clerk of this Court from Henry J. Steinglass, Assistant District Attorney dated September 19, 1979.

its *per curiam* affirmance found it unnecessary to adopt the ruling in that case.

> We find it unnecessary to decide in this case whether the *Apfelbaum* more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, even under the more liberal *Cameron* standard it was clearly improper to admit virtually all of his immunized Grand Jury testimony. 596 F.2d at p. 44.

Respondent's position, as stated in the brief in opposition to the petition for a writ of certiorari, is that this case cannot and should not be disposed of by resolution of the *Apfelbaum* issue. At the expense of brief repetition,

> In *Apfelbaum* truthful immunized testimony, *relevant* to the prosecution's case, was held inadmissible since it went beyond the *corpus delicti* of the perjury charge. The *Apfelbaum* rule therefore is far more stringent than the "rule" interpreted from the broader language found in *Cameron*. The point to be made here is that the instant case does not contain an *"Apfelbaum"* issue. (Respondent's brief, p. 6).

Now that the Third Circuit's ruling in *Apfelbaum* has been swept away, indeed by a virtual tidal wave, the fact remains that this case should not be found to have been swept away with it.

In the instant case the truthful immunized testimony was neither relevant to nor probative of the false swearing. As stated by the Court of Appeals:

> Assuming at least some of [the testimony] was truthful, it had no *probative value* in determining whether the alleged perjurious portion was intentionally false. 596 F.2d at p. 44.

The *Apfelbaum* case deals with a situation where, as earlier noted, the disputed testimony was relevant. This Court concluded therefore that ". . . neither the immunity statute nor the Fifth Amendment preclude the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence." (Majority opinion p. 16). Here, since the testimony was found by both the District Court and the Court of Appeals not to have been relevant, it is the Fifth Amendment which precludes introduction. *Cameron* v. *United States,* 231 U.S. 710 (1914). Plainly stated, there is a constitutional shield which bars introduction of truthful immunized testimony which has no conceivable bearing on the prosecution's perjury case. Where, as here, a state trial judge ruled such testimony admissible, a constitutional violation has resulted.

CONCLUSION

For these reasons and for the reasons stated in Respondent's initial brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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